IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

ADOLPH COHN,
APPELLANT,

v.

ANGELA DIAS (DE DALEY),
APPELLEE.

No. 136.

Appeal from the Supreme Court of the Territory of Arizona.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The statement of the case found in the brief for appellant apparently assumes that what purports to be the evidence at large (transcript, pp. 19 to 88) is before this court for review or examination. On behalf of the appellee we deny the correctness of this assumption. And as the statement of appellant is based almost entirely upon facts established, or supposed to be established, by this

evidence at large, with no special findings by the court below, counsel find it necessary to submit, on behalf of appellee, an additional statement of the case.

The case is a suit, brought under the Revised Statutes of the Territory of Arizona, by the appellant, complainant below, in the District Court for the first judicial district in and for the county of Cochise, against the appellee, Angela Dias, sued as Angela Dias de Daley, and others, to determine the title to or ownership of certain real estate, being certain mining claims, locations, and property situated in said county. Default having been made by all defendants except appellee, the cause proceeded to hearing upon complaint, answer and cross-complaint and testimony. The decree or judgment of the trial court, upon the record thus made, was in favor of appellee; appellant appealed to the Supreme Court of the Territory; the final decree or judgment of the last-mentioned court affirmed that of the District Court, and appellant thereupon appealed to this court.

There was no opinion delivered or filed by either of the courts below; there is no statement of the facts in the nature of a special verdict, by either of said courts; there is no finding by the Supreme Court of the rulings of that court on the admission or rejection of evidence, and there is no statement of the rulings of the District Court, upon the evidence, unless the incorporation into the transcript, upon appeal from its decree, of what purports to be the evidence at large, be considered as such a statement.

The proceedings in the cause, necessarily stated in detail in order to explain the situation, were substantially as follows:

September 4, 1890, bill of complaint filed by appellant, which, after formal allegations of ownership in himself, of the real estate involved in the case at bar, and adverse claims without right in defendants, alleges, as specific deraignment of title, that on September 13, 1890, A. J. Mehan, one of the defaulting defendants, was the owner of said property; that on said date said Mehan was indebted to complainant in the sum of $299; that upon said date complainant brought suit for said amount against said Mehan, in a justice court of said county, and obtained personal service upon Mehan, who duly appeared and made defence; that upon commencing said suit, September 13, 1890, complainant also caused writ of attachment to issue, which was duly levied and recorded in the office of the county recorder; that, September 29, 1891, complainant obtained judgment in said suit against Mehan; that, upon such judgment, execution issued; that such execution was duly levied and sale made thereunder, at which sale, October, 27, 1891, complainant became the purchaser of the said real estate; that said Mehan failed to redeem said property within the time allowed by law, and that thereafter complainant received constable's deed for the same, which is duly recorded in the county records. (Transcript, pp. 2 to 4.)

September 17, 1891. Answer of appellee, Angela Dias, which combined a demurrer with general denial of ownership by complainant (p. 5).

November 10, 1891. Amended answer of appellee, which, after demurring and denying specifically all the averments of the complaint, for further answer and as counter claim and cross-complaint, with prayer for affirmative relief, alleges that on April 11, 1890, and for more than five years prior thereto, appellee and one James Daley were husband and wife; that at time of their marriage Daley

owned no property or money and did not earn or acquire any during said marriage; that at date of said marriage appellee owned $3,000 in money in her own right; that, during said marriage, appellee and Daley used all of said sum prospecting for, locating, procuring, preserving and maintaining title to the mining claims involved in the suit; that during this time appellee was uneducated and utterly ignorant of the language, laws, and customs of the United States, and, confiding and relying upon the advice and direction of her husband, advanced her money for the purposes aforesaid; that, taking advantage of this ignorance and confidence, Daley took and kept title to all of said property in his own name without the knowledge or consent of appellee; that on said 11th day of April, 1890, Daley abandoned appellee and has never since returned to or communicated with her; that, on September 2, 1890, Daley conveyed all of said property, without consideration, to Mehan, who had full knowledge and notice of appellee's equities; that Cohn purchased at the constable's sale, with full notice and knowledge of said equities, and also that Mehan gave no value for the conveyance to him; that, October 15, 1890, appellee commenced an action, No. 1534, in said District Court for said county against said Daley for divorce, for a decree awarding her all of said property, and for restoration of her former name of Angela Dias; that thereafter such proceedings were had in said cause that, May 14, 1891, the said court gave and entered its judgment and decree dissolving said bonds of matrimony, awarding appellee all of said property, and permitting her to resume her former name (pp. 5 to 9).

May 26, 1892. Answer of appellant to amended answer and cross-complaint, uniting a demurrer with denial (p. 9).

May 28, 1892. Supplemental amendment of appellee

to answer and cross-complaint, filed by leave of court, further averring that, October 18, 1890, prior to the purchase of the premises by appellant, appellee commenced an action in said District Court, No. 1535, against said Daley and Mehan, to quiet title to said property; that on said 18th day of October, 1890, after filing said suit, appellee filed and recorded in the office of the county recorder a notice of the pendency of said action containing the names of the parties, the object of the suit, and description of the property; that thereafter such proceedings were had in said suit that, upon the 26th day of May, 1892, said court entered a decree and judgment therein declaring appellee the owner of all of said property, and quieting her title thereto against said Daley, Mehan, and all persons claiming under them by title subsequent to the record of said notice; and that Cohn took title from Mehan after such record and has no other title thereto (pp. 10, 11).

May 27 and 28, 1892. Minutes of court showing order sustaining demurrer of appellee to complaint of appellant, with leave to amend; amendment of complaint at bar; order allowing appellee to amend cross-complaint; amendment of same at bar, as last above noted; introduction of testimony upon part of both parties, and submission of cause to court (pp. 11, 12).

November 22, 1892. Order of court finding the issue involved in favor of the defendant, the appellee, Angela Dias, and directing that judgment be entered accordingly (p. 12).

November 25, 1892. Decree of court. This decree, after declaring default as to all defendants except appellant, and after finding her name to be Angela Dias, and after finding generally against the complainant and in favor of the defendant, Dias, thereupon proceeds (p. 13):

"Now, therefore, it is ordered, adjudged, and decreed that the said defendant, Angela Dias, is the owner and entitled to the possession of all the mining claims and interests in mining claims in the cross-complaint in plaintiff's complaint in this action and hereinafter set out, named, and described as against said plaintiff, Adolph Cohn, and against each and every one of the defendants, A. J. Mehan, Dewitt C. Turner, Bell H. Chandler, and F. C. Fisher. And her title thereto is hereby settled and quieted as against said plaintiff and said defendants and each and every of them and all persons claiming or to claim under them or under any or either of them; and it is further ordered, adjudged, and decreed that said defendant, Angela Dias, do have and recover of and from the said plaintiff, Adolph Cohn, her costs incurred in this suit, taxed at $91.55."

November 25, 1892. Minutes of court showing argument and submission of motion for new trial (p. 12).

November 26, 1892. Minutes of court showing order overruling above motion for new trial; exception by complainant; notice of appeal, and the following order relative to the filing of a statement of facts:

"And the court does hereby grant to said plaintiff thirty days after the adjournment of this term to file his statement of facts herein."

The November term of the court, whereat the judgment or decree of November 25, 1892, was passed, adjourned December 29, 1892. See Certificate of Clerk (Transcript, p. 98), dated January 16, 1894, and filed in the Supreme Court of the Territory, January 22, 1894. The time allowed for filing a statement of facts by this order therefore expired January 28, 1893.

December 16, 1892, attorney for Cohn, appellant, submitted to attorneys for Dias, appellee, what was termed

"a full statement of facts." (Transcript, p. 87.) This statement was what purported to be the entire evidence at large, as made up from the stenographer's report thereof. It was not accepted by attorneys for Dias as correct, but on the contrary, at a date not shown by the record, said attorneys endorsed thereon, or attached thereto, their dissent and objection upon the ground that the same did not embrace certain documentary evidence introduced at the trial. (Transcript, p. 87.) Thereafter, to wit, March 6, 1893, attorney for appellant submitted to the court an amended statement, including said evidence, or what purported to be such, and thereupon, on said date, the court passed the following order (pp. 87, 88):

"Counsel for plaintiff in the above-entitled cause of Cohn *v.* Mehan *et al.*, having heretofore, to wit, on the 16th day of December, 1892, submitted to me a statement of facts in said cause, and the same having been thereupon submitted to counsel for defendants, and being by them disagreed to as correct, and being likewise found by me to be incomplete, because omitting documentary evidence, said counsel for plaintiff did thereafter, to wit, on the 6th day of March, 1893, submit the foregoing as an amended statement of facts in said cause, and the same was, on said 6th day of March, 1893, by me approved and signed."

This so-called statement of facts was filed in the cause, in the clerk's office of District Court in May, 1893. (Transcript, p. 19.) There is nothing in the record to show that either the original, or the amended paper, was ever at any time filed in the cause prior to the last above-mentioned date. As above stated, this so-called statement of facts is the entire body of the proceedings at the trial according to the stenographer's notes (pp. 19 to 88).

December 16, 1892, being the same date upon which

the statement of facts was exhibited to adverse attorneys, appellant filed, in said District Court, what is termed a bill of exceptions. This paper contains twelve statements of claimed errors in the trial court, including the overruling of the motion for new trial, which motion is set out in full. The entire bill, however, has reference to the statement of facts, and without such statement is hardly intelligible as raising any specific point of law (pp. 14 to 18).

Immediately following the statement of facts, as found in the transcript, is an assignment of errors, upon the appeal, which shows no date of filing (pp. 88, 89). January 28, 1894, however, there was filed in the Supreme Court (Transcript, p. 102) a certificate of the clerk of the District Court to the effect that such assignment was filed in said District Court and attached to the transcript before the latter was delivered to attorney for appellant. The errors assigned are substantially the points mentioned in the bill of exceptions.

January 9, 1893. Appeal bond filed, in sum of $300, approved by clerk (p. 90).

September 29, 1893. Certificate, clerk of District Court, that transcript, as above summarized, was demanded by appellant March 6, 1893, and was delivered to appellant September 29, 1893 (p. 90).

December 25, 1893. Appellant filed in the Supreme Court of the Territory, endorsed "Supplement to record," an exemplified copy of the bill of complaint in the District Court, in the case of Dias *v.* Daley, Mehan *et al.*, No. 1535, being the case mentioned in appellee's supplemental amendment to answer and cross-complaint (pp. 91 to 93).

January 9, 1894. Motion by appellee, filed in Supreme Court of the Territory, to strike from the transcript certain portions thereof, as follows: (1) The statement of

fact, because the same was not approved, settled, signed by the trial judge or filed within the time allowed by statute; (2) The bill of exceptions, because it does not contain a statement "with circumstances," or so much of the evidence as is necessary to explain the same; (3) The assignment of errors, because not filed before the delivery of the transcript; (4) The paper filed December 5, 1893, because not properly part of record (pp. 93, 94).

January 9, 1894. Motion by appellee, filed in Supreme Court, to dismiss the appeal on the grounds: (1) That there is no transcript on file properly certified under the law; (2) That the appeal bond filed is insufficient (p. 94).

January 9, 1894. Order of court allowing appellant until January 11, 1894, to answer last above motion (pp. 94, 95).

January 11, 1894. Answers of appellant to both of the above-mentioned motions filed (pp. 95 to 98). These "answers" are simply arguments of the matters presented by the motions. That directed to the motion to strike out, however, incorrectly states that the statement of fact was signed by the court during the term. The fact is exactly the reverse, as hereinbefore set forth.

January 25, 1894. Order of court that the bonds on appeal, original and supplemental, theretofore filed, are insufficient; that appellant have leave to file sufficient bond and reply brief before January 29, 1894, and that upon the incoming of said bond and brief, the cause stand as submitted (p. 100).

January 25, 1894. Appeal bond filed under order of court last above (p. 101).

March 8, 1894. Decree of court affirming the decree of the District Court, as follows, (p. 102):

"This cause having been heretofore submitted and by

the court taken under consideration, and the court having considered the same and being fully advised in the premises, it is ordered that the judgment of the lower court be, and the same is hereby, affirmed; and it is further ordered, adjudged, and decreed that the appellees herein, A. J. Mehan, Dewitt C. Turner, Bell H. Chandler, F. C. Fisher, and Angela Dias de Daley, do have and recover of and from the appellant, Adolph Cohn, and his sureties, David Cohn and S. Tribolet, on the appeal bond herein, the sum of $91.55, their costs in the court below, and the further sum of $, their costs in this court."

March 15, 1894. Motion for rehearing, based upon the assumption that the so-called statement of facts was before, and considered by, the court, and alleging errors by the court in not reversing the decree below for the following reason: (1) There was no evidence of a resulting trust in favor of appellee; (2) And no competent evidence of an express trust; (3) Legal title was, therefore, in Mehan at time of levy and appellee has no equity (pp. 102, 103).

January 14, 1895. Motion or request of court, by appellant, that, in case rehearing be not granted, the court will file proper findings or make such suggestions as will enable counsel to prepare the same (pp. 103, 104).

January 16, 1895. Order granting appellant's motion for rehearing and placing cause at the foot of the calendar (p. 104).

January 17, 1895. Order of the court that all motions be deemed submitted and case be considered in regular order on the printed calendar (p. 104).

July 10, 1895. Decree of court again affirming the decree below as follows (p. 104):

"This cause having been heretofore submitted and by the court taken under consideration, and the court having

fully considered the same and being fully advised in the premises, it is ordered that the judgment of the lower court rendered herein be, and the same is hereby, affirmed; and it is further ordered, adjudged, and decreed that appellee Angela Dias herein do have and recover of and from the appellant herein and S. Tribolet and Emil Sydow, the sureties on the appeal bond herein, the sum of ninety-one and $\frac{55}{100}$ dollars, her costs in the lower court, and her costs in this court, taxed at sixteen dollars."

July 10, 1895. Motion or request to court, by appellant, to file statement of facts in the nature of a special verdict and also of rulings upon the evidence (pp. 104, 105).

July 10, 1895. Order of court denying above motion (p. 105).

July 15, 1895. Prayer, in open court, for appeal to the Supreme Court of the United States, with affidavits showing value of premises to be $20,000 (pp. 105 to 107).

July 15, 1895. Order of court allowing appeal as prayed (p. 105).

July 23, 1895, after the allowance by the Supreme Court of the Territory of an appeal to this court, as above noted, there was filed in the court below a paper which is denominated a "petition for rehearing." It commences, in form, as a motion by appellant for rehearing, and thereafter, for some two pages and a half of printed matter, is an argument or brief upon the evidence at large to show that the court erred in its decrees or judgments of March 8, 1894, and July 10, 1895 (*supra*). It is not signed by the appellant in proper person or by any attorney or counsel, and was not served upon or noticed in any way to the appellee or her attorney or counsel (pp. 107 to 110).

July 29, 1895. Appeal bond, upon appeal to this court executed by appellant, which bond was, upon the 31st day

of July, 1895, in the language of the indorsement thereon, "lodged" with the clerk of the Supreme Court of the Territory, after having been, upon said last-mentioned date, approved by him. This bond was subsequently, February 27, 1897, approved by an associate justice of said Supreme Court, and, in the language of the indorsement thereon, was, upon said 27th day of February, 1897, "filed" in the cause. It is the only bond securing appellee upon this appeal (pp. 110, 111).

July 31, 1895. Order of court, July term, passed on the very day upon which the bond upon appeal to this court was approved by and "lodged" with the clerk granting entirely *ex parte*, so far as the record shows, the so-called unsigned, unserved, and unnoticed motion filed July 23, 1895, as hereinbefore recited. This order was in words and figures as follows (p. 112):

"In this cause the motion of appellant herein for rehearing, filed herein, having been fully considered by the court, and the court being fully advised in the premises, it is ordered that said motion be, and the same is hereby, granted, and that the judgment of the lower court in this cause be, and the same is hereby, reversed, and cause remanded for new trial in the court below, and it is ordered, adjudged, and decreed that the appellant herein do have and recover of and from the appellees herein his costs incurred in this cause in the lower court and the sum of forty-eight and 50/100 dollars, his costs in this court."

August 5, 1895. Motion by appellee to set aside and annul said last above-mentioned order upon the ground that it was made inadvertently, unadvisedly and without authority of law because: (1) It was passed after appeal allowed to this court; (2) It was passed without service upon or notice to appellee, as required by paragraph 956 of the Revised Statutes of Arizona; (3) It was passed

less than ten days after motion filed, in violation of paragraph 958 of said Revised Statutes (p. 112).

August 15, 1895. Motion by appellee for rehearing, upon substantially the same grounds alleged in support of the motion to set aside and annul. This motion was accompanied by the affidavit of J. L. B. Alexander, clerk of the court, to the effect that the appeal bond hereinbefore noted as having been approved and "lodged" with him, as such clerk, was filed in the cause in said court by affiant, at request of appellant, on the morning of the 31st day of July, 1895, before the coming in of the court, on said date, and before the rendering of any decision by said court reversing the judgment of the District Court (p. 114).

January 22, 1896. Motion by appellant to strike out affidavit of J. L. B. Alexander (115, 116).

January 22, 1896. Response, so called, of appellant to appellee's motion to set aside order of July 13, 1895. This paper is simply a brief by attorney for appellant (pp. 116 to 118). It is admitted to be improperly in the record by counsel for appellant in their brief filed in this court (brief, p. 26).

February 3, 1896. Order of court denying appellee's motion to set aside decree or judgment, granting appellee's motion for rehearing and setting cause down for hearing February 7, 1896 (p. 118).

February 11, 12, 13, 1896. Minutes of court showing argument and submission of the cause (pp. 118, 119).

October 2, 1896. Decree of court, November term, 1896, setting aside decree of July 31, 1895, and reinstating decree of July 10, 1895, affirming decree of District Court. This decree is as follows (p. 119):

"In this cause the motion of appellees herein to set

aside the order and judgment of this court, made and entered herein on the 31st day of July, 1895, reversing the judgment of the lower court in this cause, having been argued by counsel for appellant and appellees respectively, and duly submitted and by the court taken under consideration, and the court having fully considered the same and being fully advised in the premises, it is ordered that said motion be, and the same is hereby, sustained, and the order granting appellant's motion for rehearing proceeding said judgment of July 31, 1895, and the said judgment of July 31, 1895, in this cause be, and the same is hereby, set aside and annulled, and the said motion for rehearing is denied, and the judgment of this court of July 10, 1895, is hereby reinstated and confirmed in this cause."

February 24, 1897. Motion by appellant, in open court, for allowance of appeal and also that findings be made and filed by the court; order of court granting said appeal; order of court that the motion for findings be submitted (pp. 119, 120).

February 27, 1897. Approval of appeal bond by the court, being the identical bond hereinbefore mentioned as filed July 29, 1895 (pp. 111, 120).

March 18, 1897. Assignment of errors in the court below filed by applicant upon appeal to this court.

From the preceding abstract of the proceedings in the cause, it thus appears, as matter of fact, and proper, as part of our statement:

First. That upon the appeal to this court, the record shows no statement of the facts of the case, either in the nature of a special verdict, or otherwise, made and certified by the court below, the Supreme Court of the Territory, and transmitted to this court with the transcript.

Second. That the record shows no statement whatever of the rulings of the court below, the Supreme Court of

the Territory, upon the admission or rejection of evidence, made and certified to this court with the transcript.

Third. That the Supreme Court of the Territory, although requested by appellant, by motion or otherwise, to file such statements, refused to do so, and expressly overruled and denied a motion by appellant in that regard filed and submitted.

Fourth. That the cause, as presented to the Supreme Court of the Territory, upon the appeal from the District Court, directly presented the question whether the appellee was not entitled to a decree affirming that of the District Court on the ground that a statement of facts was not made out, signed and filed in the District Court within the time allowed by the laws of the Territory.

Fifth. That the Supreme Court of the Territory made four decrees, in the nature of final judgments in the cause; that the first two of such decrees, those of March 8, 1894 (p. 102), and July 10, 1895 (p. 104), affirmed the decree of the District Court; that the third of such decrees, that of July 31, 1895 (p. 112), reversing the decree below, was made *ex parte*, upon motion not noticed to the appellee; that the fourth, that of October 2, 1896 (p. 119), reinstated the first two decrees and again affirmed the court below, and that all of said decrees affirming the court below may, upon the record, have been based solely upon a finding that no statement of fact was filed in the District Court in compliance with law.

Sixth. That the statement of facts or evidence at large, certified by the District Court, is not approved or adopted by the Supreme Court of the Territory by any of the four decrees made as above recited.

Seventh. That no alleged error in the admission or rejection of evidence is brought to the attention of this court, by either the bill of exceptions, the assignments of error,

or in any other way, except by reference for necessary explanation to the statement of facts or evidence at large, filed in the District Court under the circumstances recited.

BRIEF.

The brief of counsel for appellant proceeds entirely upon the theory that the facts in the case, as and how they may appear by the evidence at large, filed in the District Court, are before this court for review. Proceeding upon this theory, counsel first state certain of the facts shown by this testimony, add other alleged facts not so shown even by offers of proof, and thereupon argue two propositions which they assume to rise upon such facts. Entertaining as we do an entirely different conception of the position of the case in this court, we find it impossible to follow the brief of our opponents. Instead thereof we desire to submit certain propositions following the statement of facts which we have ourselves above set out.

I.

QUESTIONS OF LAW, ONLY, ARE HERE FOR REVIEW.

To review in this court the final decree or judgment of the highest court of a Territory, in a case tried by the court without a jury, the remedy is by appeal. An appeal thus prosecuted raises no question of fact and only such questions of law as may appear from a specific statement of facts in the nature of a special verdict or from a statement of the rulings of the trial court upon the admission or rejection of evidence duly excepted to at the trial.

Act of April 7, 1874, 18 Stat. 27, 28.

Hecht *v.* Boughton, 105 U. S. 235.

Idaho & O. L. Co. *v.* Bradbury, 132 U. S. 509, 513, 514, 515.
San Pedro Co. *v.* U. S., 146 U. S. 120, 130, 131.
Haws *v.* Victoria Co., 160 U. S. 303, 312, 313.
Salina Stock Co. *v.* Salina Creek Co., 163 U. S. 109, 118.
Marshall *v.* Burtis, January 30, 1899 (unreported).

Upon an appeal of this character, the special finding, or statement, is not a mere report of the evidence but a finding of the ultimate facts upon which the rights of the parties are to be determined; and a bill of exceptions cannot be used to bring up the whole testimony for review.

Act of March 3, 1865, 13 Stat. 501.
Norris *v.* Jackson, 9 Wall. 125, 127, 128.
St. Louis *v.* W. U. T. Co., 116 U. S. 388, 391.

In other words, this court has now before it no question of fact; it will not undertake to say whether, upon the whole testimony, the decree is sustained by the evidence, and it will only consider such questions of law, if any, as are presented by a statement of facts in nature of a special verdict, or by a similar statement showing rulings of the trial court during the progress of the trial.

II.

The Record Contains No Special Verdict.

It will be borne in mind that neither of the courts below filed any opinion; that in the Supreme Court of the Territory no statement of facts whatever was filed or approved, and that the only finding or statement of facts filed or approved in the trial court was the entire body of

the evidence according to the stenographer's notes thereof, which was certified to the Supreme Court of the Territory in supposed compliance with the statute.

The civil procedure act of Arizona, governing the preparation of findings or statements of facts upon appeal, is found in sections 843, 844, and 845 of the Revised Statutes of said Territory (1887, p. 186), and is as follows:

"843. (Sec. 195.) After the trial of any cause either party may make out a written statement of the facts given in evidence on the trial and submit the same to the opposite party or his attorney for inspection. If the parties or their attorneys agree upon such statement of facts, they shall sign the same and it shall then be submitted to the judge, who shall, if he find it correct, approve and sign it, and the same shall be filed with the clerk during the term."

"844. (Sec. 196.) If the parties do not agree upon such statement of facts, or if the judge do not approve or sign it, the parties may submit their respective statements to the judge, who shall from his own knowledge with the aid of such statements, during the term, make out and sign and file with the clerk a correct statement of facts proven on the trial, and such statement shall constitute a part of the record."

"845. (Sec. 197.) The court may, by an order entered upon the record during the term, authorize the statement of facts to be made up and signed and filed in vacation, at any time not exceeding thirty days after the adjournment of the term."

The act of Congress of April 7, 1874 (18 Stat. 27, sec. 2), concerning practice in the territorial courts, after declaring that the appellate jurisdiction of this court, in cases of trial by jury, shall be exercised by writ of error, and in all other cases by appeal, according to such rules

and regulations as to form as the court may prescribe, thereupon provides (p. 28):

"That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree."

Under this legislation, national and territorial, it is obvious that in the case at bar there is no statement of facts in the nature of a special verdict, upon which can be predicated any question of law. The statute of Arizona undoubtedly contemplates a finding of ultimate facts, in condensed and succinct form, based upon the evidence at large, not a mere report of the evidence, complete or partial, upon which such ultimate facts rest. The federal statute is equally plain and unambiguous. It distinctly provides that *instead* of the evidence at large, there shall be a statement of facts "in the nature of a special verdict;" that is to say, a special finding of specific ultimate facts, from the evidence at large, to which the court may apply the law. That this is the meaning, force and effect of this statute of 1874, is settled by repeated decisions of this court. It is an undying principle of all the cases cited under the last above subdivision of this brief and is specifically declared in the following cases arising under the similar acts of March 3, 1865 (13 Stats. 501), and February 16, 1875 (18 Stats. 315), and the territorial act of April 7, 1874:

Norris *v.* Jackson, 9 Wall. 125.

Dirst *v.* Morris, 14 Wall. 484.

Boogher *v.* Insurance Co., 103 U. S. 91, 97.

The City of New York, 147 U. S. 72.
Lehnen *v.* Dickson, 148 U. S. 71 to 74.
St. Louis *v.* W. U. T. Co., 166 U. S. 388, 391.
Marshall *v.* Burtis, January 30, 1899 (unreported).

It follows, therefore, even if the entire evidence as a whole be considered as properly in the case, for any purpose, that it is not a statement of facts in the nature of a special verdict, within the meaning of the act of April 7, 874, and that no questions of law are, by this method at least, here presented for review.

III.

The Record does not Show the Rulings of the Trial Court on Admission or Rejection of Evidence.

The federal statute of 1874 obviously contemplates that, in addition to the statement of facts in the nature of a special verdict, the court below shall also make and certify to this court an additional special statement of the rulings of the trial court upon the admission or rejection of evidence. The general purpose of the statute was to permit the courts of the Territories to unite common-law and equity proceedings in the same cause, and that when causes, so tried, were to be reviewed in this court, it should be by writ of error in all cases of trial by jury and in all other cases by appeal. The purpose seems to have been, in cases of appeal, to bring questions of law before this court by means of special findings or statements made by the court below. A fair reading of the first proviso to the second section of the act is that there should be certified not only a statement of the facts in the nature of a special verdict, but that all other questions of law should also be

certified in like manner, thus avoiding the usual incident of a trial by jury, the ordinary bill of exceptions. No such finding or statement of the rulings of the trial court on the admission or rejection of evidence has, in the case at bar, been certified to this court by the Supreme Court of the Territory. There is, therefore, nothing, in this form, before the court upon which it can review any question of law.

Without such a special statement, as apparently required by the act of 1874, there are, in any event, only three ways in which questions of law can arise in this court:

First. By a bill of exceptions properly drawn and containing within itself such a statement of circumstances and so much of the evidence as is necessary to explain the questions presented.

Second. By a bill of exceptions referring to some accepted, determined or authorized statement of facts making the questions intelligible.

Third. By some accepted, determined or authorized statement of facts, from which, by assignments of error properly filed, the rulings of the trial court complained of may sufficiently appear.

We submit that the record in the case at bar, in none of these forms, properly presents any question of law to the court. And as this proposition rests largely upon the question whether there is in the case any statement or finding of fact, available to appellant, for any purpose whatever, we submit the following subordinate propositions:

(*a*) The evidence at large, the only statement found in the record, is not properly before this court even to raise or present questions of law, not having been filed within

the period required by statute and never having been affirmed, approved, or adopted by the Supreme Court of the Territory.

(*b*) The bill of exceptions found in the transcript does not contain, within itself, such a statement of circumstances and so much of the evidence as is necessary to show the questions presented.

(*c*) The bill of exceptions, deficient as above, cannot be rendered certain by reference to the excluded statement of fact.

(*d*) The excluded statement of fact, the whole evidence, cannot, upon assignments of error, be considered to determine questions of law.

(a) *The evidence at large not in the case for any purpose.*

The evidence at large was not properly in the case, for any purpose whatever, in the Supreme Court of the Territory, and is not properly here for consideration. The statement at large, now found in the transcript, was not made out, signed, and filed in the trial court within the time authorized by the Revised Statutes of the Territory, Sections 843, 844, and 845, hereinbefore quoted in full. Section 843 provides for the preparation of a written statement of facts, by the parties themselves, to be approved and signed by the judge and filed with the clerk "*during the term.*" Section 844 provides for the contingency of the parties themselves not agreeing upon a statement of facts, and in that event for the submission to the court of counter claims of fact, and the settlement by the court of such a statement, which is to be signed and filed with the clerk "*during the term.*" Section 845 gives the court the power, by order entered upon the record, "during the term," to authorize a statement of facts

to be made up, signed, and filed in vacation, at any time "*not exceeding thirty days after the adjournment of the term.*"

The facts in the case at bar are that the decree of the trial court in favor of the appellee, defendant below, was made and entered at the November term of said court, to wit, November 25, 1892 (Transcript, pp. 12, 13, 14); that the November term of the court adjourned December 29, 1892 (Transcript, p. 98); that during said term, November 26, 1892 (Transcript, p. 12), the court passed an order allowing the plaintiff thirty days after the adjournment of the term to file his statement of facts; that this extended period for filing such statement expired January 28, 1893; that during this extended period the only thing done by the plaintiff to comply with the statute and the said order of court was to exhibit, December 16, 1892, to the judge of said court and to the attorney for the defendant a so-called statement of fact, which statement, while purporting to be the stenographer's transcript of the evidence at large, was not such in fact, but omitted a large portion, if not all, of the documentary evidence introduced by the defendant; that this proposed statement of fact was not accepted nor concurred in by the attorney for defendant; that thereafter, to wit, March 6, 1893, long after the adjournment of the term, attorney for appellant submitted to the court an amended statement, including what purported to be the evidence previously omitted, which amended statement was on said last mentioned date, and no earlier, approved and signed by the court (Transcript, pp. 87 and 88); that this amended statement was not filed in the cause in the clerk's office, in the District Court, until May, 1893, over three months after the adjournment of the November term (Transcript, p. 19); that even this amended state-

ment did not include, as shown upon its face, all the documentary evidence introduced at the trial, in that it omitted the pleadings in cases No. 1534 and No. 1535 (see agreement, transcript, page 82); that after the transcript had been filed in the appellate tribunal the plaintiff attempted to add to it, in that court, an exemplified copy of the complaint, only, in a single one of said causes (pp. 91 to 93), which paper defendant promptly moved to strike from the transcript (p. 94); that the defendant, the appellee here, never at any time consented to the correctness or to the filing of said statement, either during the November term or thereafter; that upon the contrary, as soon as the transcript reached the Supreme Court of the Territory, to wit, January 9, 1894, the defendant filed motions both to strike out the transcript and to dismiss the appeal, upon the ground, among others, that the statement of fact in question had not been filed within the time allowed by law (Transcript, pp. 93 and 94); that, after answers to these motions and various other proceedings had, the court, March 8, 1894, with these motions duly submitted and taken under consideration, made and entered its first decree, affirming, in general terms, the decree of the District Court (p. 102).

In other words, even considering the evidence at large as a finding of fact in the nature of a special verdict, or as a statement of the rulings of the trial court upon the admission or rejection of evidence, as required by act of 1874, still it was not filed within the time required by the statute of the Territory, and the case thus went to the Supreme Court of the Territory, upon appeal, with no statement of fact, either general or special, upon which the appeal might be considered and decided.

We submit that the revised statutes of the Territory, governing this question, are entirely clear and unam-

biguous. Time is evidently of the essence of the statute in respect to the preparation of the statement. The law in this regard is mandatory. All three sections referred to are explicit in requiring the particular thing referred to to be done within a specific period. If the statement of fact is settled by the parties themselves without the intervention of the court, it must be so done and filed "during the term." If settled by the court, where the parties disagree, it must be signed and filed "during the term." And, apparently, in order to make the limitation of time clearly mandatory, the next succeeding section limits any extension of time to the specific period of thirty days by an order of the court made "during the term" and limits the extension to thirty days "after the adjournment of the term."

It would be difficult to devise language more clearly and specifically showing the legislative intent to require this statement to be filed within a certain period in order to make the appeal effective. If not so filed it seems clear that it cannot, in any event, unless by consent of the parties, and perhaps not even then, be considered as perfecting the record so as to entitle the appeal to consideration.

The Supreme Court of the Territory, as early as April, 1890, four years prior to its first decree in the case at bar, had occasion to give construction to the provisions of the practice code and, at that time, in a decision which has ever since been the rule of procedure, held and decided, among other things:

(1) That it had no jurisdiction unless the appeal bond was filed in the court below within the time prescribed by the statute; (2) That the transcript must affirmatively show that such bond was filed within the statutory period; (3) That exceptions might be preserved by incorporation

into the statement of facts, with accompanying bill of exceptions, but only where such statement and bill were prepared and filed in strict conformity to the requirements of the statute, time included; (4) That the transcript must affirmatively show that both statement and bill were filed within the statutory period; (5) That in default of compliance with these requirements the appeal might be either dismissed or the judgment below affirmed.

Sutherland *v.* Putnam, 24 Pac. Rep. 320.

Under this obviously correct interpretation of the statute, it makes no difference whether, after the transcript had been filed in the appellate court, the appellee was entitled to show the date of the adjournment of the term by filing the official certificate of the clerk of the court below. The defendant, if relying at all upon the statement, was required affirmatively to show by the transcript that the statement was filed in time. We submit, however, that in respect to such a question, the certificate of the clerk was competent to complete the transcript.

In this connection it is important to note the further fact that the Supreme Court of the Territory, during all the time that the case was pending before it, never, at any time, by any of its various decrees or orders, accepted, affirmed, or approved this finding of facts, or the attempted introduction into it of a part of the pleadings in cause No. 1535, and still further that the said court not once but repeatedly declined and refused to file any findings or statement of facts upon which its own decrees proceeded. (Transcript, pp. 103, 104, 105, 119, 120.)

In other words, the statute of the Territory required this statement of fact to be filed within a certain period; that was not done; the defendant, upon that ground, moved the Supreme Court for such action therein as might

be necessary in view of this defect, and upon consideration of the case thus presented the court, four years after the decision in Sutherland *v.* Putnam (*supra*) giving construction to the act, upon the motions and without consideration of the so-called statement, passed and entered its final decree affirming the decree of the court below and refused to make or file any findings of fact. From these circumstances but one conclusion is to be drawn, to wit, that the Supreme Court of the Territory found the record as brought to it to be without any statement of fact and the defendant below therefore entitled upon that ground, if upon no other, to an affirmance of the decree of the District Court.

It thus appears, we respectfully submit, that the record in the case is now before this court without any finding of fact whatever under the statue of April 7, 1894, upon which it can proceed to review the action of the court below. The so-called statement was not filed in the trial court within the time required by the mandate of the local statue; the Supreme Court never accepted, approved, or affirmed the same, but upon the contrary proceeded in the case consistently with a rejection thereof, and such statement, so in default of the time requirements and so lacking the approval of the court below, cannot be here considered for any purpose whatever.

(b) *The bill of exceptions not complete within itself.*

The bill of exceptions presented to and approved by the trial court is found at pages 14 to 18 of the record. It prefaces a statement of the rulings complained of by the assertion that "the following proceedings were had, as more fully appears in the statement of facts herein, expressly referred to, and the exceptions to rulings of the

court as therein shown are made a part of this bill of exceptions." The bill thereupon proceeds to state twelve alleged rulings of the trial court to which objections were taken. We submit, without at this point discussing them in detail, that, in the absence of a statement of facts explanatory thereof, no one of these separate allegations of error is a good bill of exceptions within the rules of law, inasmuch as no one of them contains within itself a statement of the circumstances connected with the ruling and enough of the evidence to explain the same. Every one of the twelve exceptions, not only generally, as above noted, but separately, by necessity, refers to and rests upon the statement of facts. The twelfth exception is to the order overruling the motion for a new trial, and includes the whole of the motion, itself containing repeated references to the statement for explanation. Indeed, it is obvious that the pleader had no idea of framing the bill otherwise than by reference to a statement which had been contemporaneously prepared, but which, as hereinbefore noted, was never filed or approved by the court, or in any way made part of the transcript. And, as thus prepared, the bill of exceptions itself, and within itself, is not such a statement of the rulings and exceptions as the law requires.

The general rule, too well established to excuse, in this court, the citation of authorities, is that a bill of exception must set forth clearly and distinctly all the facts upon which the ruling complained of was based and the exact adjudication or ruling in respect to which error is claimed; that error must be made to affirmatively appear; that if the bill be capable of two constructions, that most favorable to the validity of the judgment must be adopted, and that the bill will always be taken most strongly against the party taking the exception.

Following the primary rule upon this subject, the code of

civil procedure of the Territory, under the heading of bill of exceptions, expressly declares how such a bill must be framed. Sections 824 and 825 of this code (1887, page 184) provide:

"824 (Sec. 176.) No particular form of words shall be required in a bill of exceptions, but the objection to the ruling or action of the court shall be stated with such circumstances, or so much of the evidence as may be necessary to explain it and no more, and the whole as briefly as possible."

"825 (Sec. 177.) Where the statement of facts contain all the evidence requisite to explain the bill of exceptions, it shall not be necessary to set out the evidence in the bill of exceptions, but it shall be sufficient to refer to the same as it appears in the statement of facts."

Under these provisions of law, where a statement of fact contains all the evidence necessary to explain the exception, the bill need not necessarily set out such evidence otherwise than by reference to the statement. But if there be no such statement, then the bill itself must show the ruling or action of the court by setting out the circumstances under which it was made and also so much of the evidence as is necessary to explain the action taken.

In the case at bar, as already shown, there is in law no statement of fact whatever in the record. The reference to such a statement in the bill of exceptions does not, therefore, explain the rulings questioned. And as the bill itself does not meet the requirements of the general rule and the statute, it results that no question of law is, by means of said bill, presented to this court for review.

(c) *The bill of exceptions not aided by its reference to the statement of fact.*

This court has intimated, and perhaps held, that upon

exceptions duly taken and here exhibited by bill, a reference for explanation thereof may be made to the whole evidence at the trial if the same has been duly incorporated in the record (Idaho & Oregon Land Company *v.* Bradbury, 132 U. S. 509, 514, 515, 518). But in the case at bar there is in law no statement of fact whatever in the record. And this being so, it is obvious that a defective bill of exceptions cannot be perfected by reference to such a statement. The pleader appears to have drawn a bill of exceptions based upon the assumption that a statement contemporaneously drawn would become a legal statement in the case. This expectation, unfortunately for appellant, was not subsequently realized. The appellant is thus left without a legal statement upon which to rest his bill of exceptions, and the bill necessarily falls.

(d) *The statement, upon assignment of errors, not available to raise legal questions.*

There are in the case as now pending in this court two different assignments of errors; one filed upon appeal from the trial court to the Supreme Court of the Territory (pp. 88, 89), and one filed in the last mentioned court upon the appeal to this court (pp. 120, 121). These assignments seem in each instance to be based upon the erroneous assumption that the whole evidence taken in the trial court is before the appellate court for review. But in addition such assignments, in part, attempt to raise certain questions of law by reference to this entire evidence treated as a statement of facts.

If it appeared from the record that the whole of the evidence taken in the trial court had been legally filed and approved, within the time allowed by the statute, as a statement of facts, and if it further appeared that this

statement had been affirmed and adopted by the Supreme Court of the Territory, upon the appeal from the trial court, as such a statement, the question might possibly arise whether errors of law appearing therein might not be reviewed in this court as suggested by assignments of error. No such question, so far as we are advised, has ever been decided or presented. The nearest approach to it known to counsel was in Haws *v.* Victoria Copper Mining Company (160 U. S. 303, 313), wherein the court held that where the Supreme Court of the Territory affirmed the findings of the trial court and thus adopted them as its own, they served the purposes of a finding of fact upon appeal to this court. In that case, however, the findings of the trial court did not embrace the entire testimony but were specific findings of ultimate facts as required by the act of 1874.

A complete and conclusive answer, however, to the proposition, in the case at bar, is found in the considerations—first, that, as already pointed out, the body of the evidence relied upon as a statement of facts was not made, approved or filed within the time allowed by law; second, that such statement was never affirmed or accepted as such by the Supreme Court of the Territory.

We accordingly, under this general proposition, submit that nothing in the record properly presents to this court for review any question affecting any ruling of the trial court on the admission or rejection of evidence, and that this appearing, and there being no finding in the nature of a special verdict, the decree below should, upon these grounds alone, be affirmed.

IV.

The Rulings of the Trial Court as Attempted to be Shown by the Bill of Exceptions.

The bill of exceptions attempts to raise twelve questions involving alleged error by the trial court in the admission or rejection of evidence. Only five of these are even referred to in the brief of counsel for appellee, filed in this court, and in these five instances the argument of counsel is, in fact, nothing more than a mere statement of the propositions, comprising in all less than sixteen lines on pages 19 and 20.

Under the circumstances nothing further upon our part than a brief notice of these five rulings seems necessary; and that only upon the assumption that the exceptions are rendered intelligible by reference to the judgment roll itself, or that we are mistaken in the proposition that the record contains no statement of facts whatever. These five exceptions are as follows:

First. To the admission of the deposition of A. J. Mehan (Exception I), on the ground of no showing of Mehan's absence. (Transcript, p. 15.) As to this exception, it is only necessary to say that without reference to the statement there is nothing to indicate what showing of absence was made; that upon reference to the statement it appears that there was abundant positive proof of absence (pp. 50 to 53), and that in any event the ruling is one of mixed law and fact not reviewable upon bill of exception.

Second. To the admission of the deposition of the said Mehan, on the ground that his testimony was parol evidence offered to vary a deed, and that he could not be heard to dispute his title against a judgment creditor. (Exception VI, p. 15.)

The bill of complaint alleged title in plaintiff through a judgment recovered against Mehan; execution thereon against this property, advertisement, and sale thereof, and a purchase at such sale by plaintiff, the judgment creditor.

The answer of defendant denied title in plaintiff; alleged that the record title in Mehan was solely under a deed from Daley; that such deed was without consideration and with knowledge of an equitable title in defendant; that the plaintiff purchased with knowledge of such equitable title; that by decree of divorce, defendant was awarded full title to all of said premises; that by final decree in another suit against Daley, Mehan and others, the title of plaintiff had been quieted as against said defendants in said suit and all persons claiming under them by title subsequent to commencement of such suit, and that plaintiff's only title was subsequent thereto. The deposition of Mehan was to the effect that the deed to him was without consideration; that when he received it he promised Daley to take care of the property for the benefit of his (Daley's) wife, the defendant; that witness was to sell the property and satisfy the defendant after paying his own expenses, and that Daley at the time declared to witness that it was defendant's money that made the property. (Transcript, pp. 49–50.)

The question primarily raised by these pleadings, under the general denial of the answer, was the validity and sufficiency of the complainant's title; and as it is entirely clear that the purchaser, whether the judgment creditor or a third party, takes only such title as was possessed by the judgment debtor, it follows that any evidence tending to show the character of the title held by Mehan was competent and relevant. To this point Mehan himself was undoubtedly a competent witness, and if his testimony

when given showed no beneficial interest in himself but only a bare legal title by a deed without consideration, that would have been conclusive against the plaintiff's title, especially if it appeared that the purchase was made with the knowledge of the facts as alleged in the special defence. The deposition when offered covered this exact point, the witness testifying that he paid no consideration and held no beneficial title.

The special defence and cross-claim set up the equitable title of defendant; that the deed to Mehan was without consideration; that appellee's equitable title was known to Mehan at the time of the conveyance; that by decree of divorce upon ground of desertion, defendant had been awarded all of said property; that by a decree in another suit, with notice of *lis pendens*, to which Mehan was a party, the title of defendant had been quieted, and that plaintiff bought at the constable's sale with notice of all these facts. To support this special defence and cross-claim, the testimony of Mehan was also clearly competent. That his deposition went further, perhaps, than was actually expected and established a positive and express trust in favor of the defendant, does not alter the situation. His testimony was competent upon either theory. Whether such testimony was sufficient to overthrow the plaintiff's case and establish that of the defendant is another question not pertinent to the present inquiry and one which, in the absence of the special verdict, this court cannot review. The only question here possible is whether Mehan was competent to testify to the real character of the transaction between Daley and himself, that real character being known to plaintiff at the time of his purchase. We submit that he was so competent.

Third. To the admission in evidence of the "judgment

roll in case No. 1,534 of Angela Dias de Daley *v.* James Daley." (Exception III; transcript, p. 15.) Case No. 1,534 is the divorce proceeding mentioned in defendant's amended answer (p. 8).

The so-called statement of facts does not include any portion of the judgment roll except the final decree (pp. 42, 43), although the entire proceeding was admitted (p. 82). The offer is shown at pages 43 and 44, where, upon objection interposed, the counsel for defendant states that the record is offered only as far as it is binding on all the world and for the purpose of showing that the defendant was the wife of Daley; that she had been divorced, and that her name was then Angela Dias; and it was admitted that the decree was not conclusive evidence on the question of property. For the purposes thus indicated at least the testimony was clearly material and admissible.

Fourth. To the admission of the "judgment roll in case of Angela Dias de Daley *v.* James Daley *et al.*, No. 1,535," on the ground that the same was immaterial, irrelevant, and incompetent. (Exception IV, p. 15.)

The document referred to in this exception is not found in the record even in the statement of facts. It appears to have been offered in evidence, at page 44, and the entire judgment roll understood to be admitted (p. 82), but no portion thereof except the final decree (pp. 44, 45, and 46) appears in the transcript. After the filing of the transcript in the appellate court, the appellant filed in said last-mentioned court an exemplified copy of a *part* of said judgment roll, the complaint (pp. 91, 92), but this is clearly not before this court for any purpose, especially in view of the fact of the admission of counsel for appellant (brief, p. 29) that an amended complaint was filed, which is not in the record.

This exception must, therefore, be explained by refer-

ence solely to the supplemental amended answer of the defendant (pp. 10, 11) and the final decree in the cause (pp. 44–46). The answer in this regard, as separate defence and cross-claim, alleges that prior to plaintiff's purchase at the execution sale the defendant, as plaintiff, commenced an action, No. 1,535, against James Daley, Mehan, and one Dewitt C. Turner (to whom Mehan had conveyed an interest) to quiet title; that upon the commencement of this action, defendant caused notice of *lis pendens*, stating names of the parties, object of the suit, and description of the property, to be filed in the office of the county recorder of the county; that thereafter such further proceedings were had in said cause that the court entered its final decree declaring the appellee herein, plaintiff in said suit, the owner of all the said premises, and quieting her title to the same against the said Daley, Mehan, and Turner, and all persons claiming under them or either of them, by title subsequent to the recording of the notice; and that the plaintiff, Cohn, took title from Mehan after such record, and has no other title to the premises. The decree, the only part of the judgment roll shown by the statement, declares plaintiff the owner of the premises; that the defendants have no title or interest therein; cancels the deeds from Daley to Mehan and from Mehan to Turner, and quiets the title of plaintiff as against all said defendants and all persons claiming under them subsequently to the filing and recording of the notice of *lis pendens*. The exception was to the admission of this judgment roll on the ground that it was immaterial, irrelevant, and incompetent. The substantial and real objection is not that the judgment roll is not material, relevant, and competent to prove the issue as raised by the pleadings, but that the case itself, as thus made, does not sustain the conclusion of the court as expressed in

the decree. In other words, a question of mixed law and facts, decided in a general finding by the court below, is here sought to be reviewed, in the absence of a finding in the nature of a special verdict, by a bill of exception. This, we submit, cannot be permitted.

But if this be otherwise, we then submit that the appellant, as the purchaser at the execution sale, took only such title as the judgment debtor held; that this purchase was subject to any adverse rights, titles, interests, or equities, of which he had notice, actual or constructive, at the date of such purchase; that at such date he had, by the filing of the *lis pendens*, notice of the fact that the appellee claimed title to the property as against the judgment debtor; that he purchased, therefore, subject to the result of that proceeding, and that the judgment roll in the particular case was strictly material, relevant, and competent to prove the fact of the suit, the *lis pendens* and the final judgment.

Fifth. To the refusal of the court, as stated in the bill of exceptions, upon the cross-examination of the appellee, to admit questions interrogating the witness as to whether, at a coroner's inquest, she did not testify that she was not the wife of James Daley. Upon objection made, counsel stated that the object was to impeach the witness. The question was excluded. (Exception X; transcript, p. 16; statement of facts, p. 73.)

These questions were properly excluded, as expressly stated by the court in its ruling, because the witness could not be contradicted upon an immaterial point; that they could not be material except as to the marriage, and that the status of the parties was fixed by the decree of divorce.

V.

The Final Decree Below is, In Law, That of July 10, 1895.

A peculiar feature of the rather anomalous transcript in the case is the number of decrees, in their nature final, passed by the Supreme Court of the Territory. They are four in number, three affirming and one reversing the decree of the District Court.

The first in order of time is that of March 8, 1894, affirming in all things the decree of the District Court in favor of the defendant (p. 102). Thereupon, on motion of complainant for rehearing, (pp. 102, 103), which was granted (p. 104), and the intervention of other motions and suggestions, all of which were submitted (p. 104), the case was reargued, and upon second consideration thereof, the court passed and entered, July 10, 1895, its second decree to precisely the same effect as that of March 8, 1894, again affirming in all things the decree of the District Court (p. 104). This decree of July 10, 1895, was, beyond all question, a final appealable decree of the Supreme Court of the Territory. Thereupon, the appellant perfected an appeal to this court by praying the allowance of such an appeal in open court, July 15, 1895, (p. 105), the filing of affidavits, the same day, showing the value of the premises to be upwards of $20,000 (pp. 105 to 107), the allowance, on said date, by the court, of such an appeal (p. 105) and filing an appeal bond, upon such appeal, executed July 29, 1895, approved by the clerk of the court July 31, 1895, and upon this last-mentioned date filed with the clerk as a part of the record (pp. 110, 111, 114).

Pending these proceedings in perfecting an appeal,

to wit, July 23, 1893, after the prayer for appeal and allowance of the same and before the filing of said bond, there was filed with the clerk of the court a paper which is called upon its face a "petition for rehearing" (pp. 107 to 110). This paper is not signed by the appellant or by any attorney or counsel (p. 110) and no notice thereof, so far as the record shows and therefore to be taken as a fact, was in any way served upon appellee or her attorney or counsel. July 31, 1895, less than ten days after the filing of said paper, and some time later than the filing of said appeal bond, on said date, as appears by the affidavit of the clerk (p. 114), the court, entirely *ex parte* so far as the record shows, passed and entered its third decree purporting to grant the so-called "motion" for rehearing, and to reverse the decree of the District Court and to remand the cause for new trial in the court below (p. 112). These proceedings were had at the July term of the court.

August 5, 1895, appellee, by her attorney, filed a motion to set aside and annul the said decree of July 31, 1895, on the ground that the same was made inadvertently, unadvisedly and without authority of law (p. 112). August 15, 1895, appellee, by her attorney and counsel, also filed a motion for rehearing of the cause upon practically the same grounds as the motion to set aside the decree (pp. 113, 114). Counsel preparing this brief has been unable, even by the "diligent search" of the record suggested by the learned attorney for appellant in one of the various briefs which have found lodgment in the transcript, to determine the date upon which the July term of the court adjourned. It would appear, however, we think, by reference to the notice to counsel of the first of the above motions (pp. 112, 113) that this motion was within the term; and we think the only conclusion

to be drawn from the record is that the second motion, that of August 15, 1895, was also within the lifetime of said term. There would appear, therefore, at the adjournment of said term, to have been pending one motion to vacate the decree of July 31, 1895, and one motion for a rehearing of the cause.

February 7, 1896, at the succeeding, January term, the court passed an order denying the motion to set aside the decree, but granting the motion for rehearing and setting the cause down for hearing (p. 118); February 11, 12 and 13, 1896, the cause was again argued and submitted (pp. 118, 119) and, October 6, 1896, the court passed and entered its fourth decree—(*a*) sustaining the motion to set aside the order and decree of July 31, 1895; (*b*) setting aside and annulling the said decree of July 31, 1895, and the order for rehearing preceding the same; (*c*) denying the motion upon which said rehearing was ordered, and (*d*) reinstating and confirming the decree of July 10, 1895 (p. 119).

In the brief of the learned counsel for appellant filed in this court upon the appeal (pp. 23 to 29), it is contended that the court below had no jurisdiction or power to pass its decree of October 6, 1896, because made after the expiration of the July term of the court, and that the decree of July 31, 1895, therefore stands as the final judgment. And as this may possibly be a question, appearing from the judgment roll itself and perhaps properly before the court, this contention of our adversaries is here noticed.

Answering this contention on the part of appellant, we submit:

First. Even if the decree of July 31, 1895, had not been vacated, it nevertheless would have no validity because made in direct violation of the practice code of the Territory.

The Revised Statutes, under title "rehearing," after providing by section 954 that a motion for rehearing may be filed within fifteen days from date of the judgment and that such motion must specify the name and residence of opposing counsel, if known, and if not, then the name and residence of the party to the cause, thereupon, by sections 955, 956 and 958, (Revised Statutes, 1887, p. 198) exact as follows:

"955. (Sec. 307.) Upon the filing of such motion with the clerk of said court he shall make out a certified copy of such motion and transmit the same by mail to the sheriff or any constable of the county in which the attorney or opposing party, as the case may be, is alleged in said motion to reside, together with a precept commanding him to deliver the copy of the motion to the person named in such precept."

"956. (Sec. 308.) Upon the receipt of such precept and copy of motion by the officer it shall be his duty to deliver the copy of the motion to the person named in said precept, if found in his county, and to return said precept to the court from which it issued, by mail, stating thereon at what time and to whom he delivered the copy of the motion, or that the party named in the precept is not to be found in his county, as the case may be."

"958. (Sec. 310.) At any time after ten days from the return of such precept served, it shall be lawful for said Supreme Court to hear and determine such motion for rehearing and not sooner."

In the case at bar not one of these requirements was complied with. The so-called petition or motion did not specify the name and residence of either counsel or the adverse party; the clerk did not make out any certified copy thereof, or precept, and transmit the same to the sheriff or any constable of the county for service; there was no service of any copy or return of any precept, and, finally, the petition or motion was heard, determined and

the decree thereon entered by the court less than ten days, to wit, eight days, after the filing of said motion.

Upon principle, as well as under the express construction of the practice code by the highest court of the Territory (Sutherland *v.* Putnam, *supra*), these provisions are mandatory, and without compliance therewith no jurisdiction to act exists. It follows that the decree of July 31, 1895, was entered entirely without jurisdiction and void.

Second. Even in the absence of this express statutory rule, the decree of July 31, 1895, would not in any event be sustained by this court. The motion, so called, was not even dignified by the signature of either party or counsel; it was never, in any way, noticed to the appellee, and the entire proceeding was absolutely *ex parte*. It is entirely safe to say that this court would never, even in the absence of statutory provisions governing the subject, treat a decree so entered as any thing more than an act done by pure inadvertence and accident.

Third. The decree of July 31, 1895, was entered after the court had lost jurisdiction by the perfection of an appeal to this court. The transcript proper, as already recited, shows that appeal, in open court, was prayed and allowed, July 15, 1895, and that an appeal bond, the very bond and the only one now in the case, with the sureties approved by the clerk, was filed with said clerk, as part of the case, July 31, 1895. On this same date was entered the decree in question and the affidavit of the clerk of the court, (p. 114), filed with appellee's motion to vacate the decree and which to establish this fact we believe competent, shows that the filing of said bond antedated the rendition of the decree.

The code of civil procedure, governing this question, is also clear (sections 849, 859 and 861; 1887, pp. 186, 187):

"849. (Sec. 201.) An appeal may in cases where an appeal is allowed be taken during the term of the court at which the final judgment is rendered by the appellants giving notice of appeal in open court, which shall be noted on the docket and entered of record, and by filing with the clerk an appeal bond or affidavit in lieu thereof, as hereinafter provided, within twenty days after the expiration of the term."

"859. (Sec. 212.) The appellant or plaintiff in error, as the case may be, shall execute a bond with two or more good and sufficient sureties, to be approved by the clerk, payable to the appellee or defendant in error, in a sum at least double the probable amount of the costs of the suit of both the appellate court and the court below, to be fixed by the clerk, conditioned that such appellant or plaintiff in error shall prosecute his appeal or writ of error with effect, and shall pay all the costs which have accrued in the court below, or which may accrue in the appellate court."

"861. (Sec. 213.) When the bond, or affidavit in lieu thereof, provided in the preceding sections, has been filed and the previous requirements of this act have been complied with, the appeal or writ of error, as the case may be, shall be held to be perfected."

Under these provisions of the code, the court had clearly lost jurisdiction of the case prior to the decree in question. Precisely as pointed out by the statute, the appeal had been "perfected" by filing the bond with sureties "approved by the clerk." The only possible question in this connection relates to the exact hour of filing the bond on the 31st day of July, 1895. The court will hardly assume that it was filed *after* a decree rendering its filing unnecessary and preposterous. And we think that if any doubt exists on the subject, it may properly be resolved by reference to the affidavit of the clerk, the matter not being a fact in the case, but rather an explanation of docket entries of the court.

Fourth. Even if all this be otherwise, still the appellee, at the same term of court, filed a motion for rehearing and also a notice to vacate; these motions were pending at the adjournment of the term, remained undecided until the ensuing term, and, at said last-mentioned term, were granted and the decree of July 31, 1895, vacated and that of July 15, 1896, again affirmed. This, we submit, was clearly within the jurisdiction of the court.

In view of the foregoing considerations, we do not deem it necessary to follow the learned counsel for appellant in their argument of the familiar proposition that the power of a court over its judgments and decrees, generally speaking, ends with the term. The rule is simply inapplicable to the pending case which is governed by the exceptional facts and the provisions of the statutory law mentioned.

VI.

Questions upon the Merits.

In view of the foregoing it seems hardly necessary to advert to what might perhaps have been meritorious questions had the case come to this court upon a finding or statement of fact in the nature of a special verdict. Counsel for appellant assumes everything contained in the stenographer's report to be facts in the case properly here for review, and thereupon argues two certain propositions which are supposed thereon to arise. As hereinbefore stated, it is impossible to say that the decree of the court below proceeded in favor of the appellee upon any other ground than that no appeal had been properly perfected, and that the decree of the trial court should, therefore, be affirmed. There is nothing whatever in the record

to show that the Supreme Court of the Territory in passing its final decree decided any question involved upon its merits. In fact its refusal to file any finding of facts or statement of rulings indicates that its decree proceeded upon the ground that the case had not been properly brought before it; that in accordance with the construction given the practice act four years previously in Sutherland *v.* Putnam, it could in such case either dismiss the appeal or affirm the decree below, and that it, therefore, upon the ground of illegality in the appeal alone, affirmed the decree of the District Court.

Under the circumstances, and having hereinbefore, as we think, demonstrated that this court has now before it no question of either fact or law for review, we content ourselves with a bare statement of our positions as the same would appear from the record to have been presented in the trial court.

(1) The facts shown by the testimony establish a resulting trust in the appellee for the premises in controversy. Whether she was the wife of Daley, or otherwise, the acquisition of the title to these mines, under the laws of the United States, including the locations in which she actually participated, the subsequent working and development of the same and every step in the maintenance of the title, was entirely the result of the expenditure of her money, owned by her prior to her marriage, if married; she understood that the locations were in her name and such were her intention; Daley, in law, was her agent in respect to the transaction, and so acting he located the mines in his own name. Here are all the elements of a resulting trust and that was the effect of the transaction. As illustration merely of the familiar principle, see:

Pomeroy's Equity Jur., §§ 1030, 1031, 1037, 1040.

Am. & Eng. Ency. Law, Vol. 10, pp. 5 to 11, and cases cited.

Du Barry *v.* Wheeler, 30 S.W. Rep. (Mo.) 338.

Evans *v.* Welborn, 74 Texas, 530.

(2) The facts in connection with the deed from Daley to Mehan establish an express trust in favor of the appellee. The uncontradicted and unimpeached testimony of Mehan (pp. 49 and 50) is that he met Daley in Pueblo, Colorado, September 2, 1890; that on that day he deeded the premises to deponent; that deponent paid no consideration for such conveyance; that deponent promised Daley to take care of the property for the appellee, to make sale of the same, and from such sale satisfy the appellee, after paying his own expenses; that Daley told him that appellee's money had made the property; that the mines were good and that he wanted his wife protected.

The deed thus executed was, beyond all question, an express though secret trust, and was effective for the purpose contemplated unless prohibited by some statute.

Osterman *v.* Baldwin, 6 Wall. 117, 123.

That such a trust by parol was prohibited by statute is what is claimed by appellant and text writers, and several cases are cited to sustain the contention. Upon examination, however, all of these authorities will be found to be based upon some statute of frauds, either 29 Car. II, Chap. 3, Sec. 7, or statutes of similar import, declaring trusts in land not in writing void. Arizona has no such statute. Precisely such a provision once existed in this Territory, and will be found in Howell's Code, Ch. 36, Sec. 6. It was retained in the compiled laws of 1877 (par. 2119, Sec. 6, p. 362). The Revised Statutes of 1887,

however, expressly repealed this entire chapter 36 (R. S. 1887, pp. 567, 568) and enacted a new statute of frauds (R. S. 1887, Ch. 30, p. 359), from which this provision is entirely omitted. There is no prohibition, therefore, of such a trust under the statute of Arizona.

Osterman *v.* Baldwin, 8 Wall. 123, *supra.*

Counsel for appellant, realizing apparently the difficulty of this situation, suggests (brief, p. 13) that that portion of the fourth section of the English statute of frauds relating to contracts for the sale of real estate or leases thereof for more than year, which is found in the Arizona statute (Sec. 2030), prohibits the express trust in question. It was not section four but section seven of the original statute of frauds which dealt with trusts, and which, having been adopted, was, in 1887, repealed in Arizona, while section four was retained. It need hardly be suggested that the legislature, by the revised statutes of 1887, deliberately repealed the positive prohibition of section seven merely to re-enact it in the lease for years provision of section four.

Trusts have been repeatedly declared and enforced in public lands located under mining, pre-emption, and homestead laws.

Maritz *v.* Lavelle, 77 Cala. 10.
Barlow *v.* Barlow, 28 Pac. Rep. 607.
Booth *v.* Justice, 58 Tex. 106.

(3) The appellant, as a purchaser at the execution sale, took only such title as the judgment debtor held, and received such title subject to all outstanding equities, certainly to all equities of which he had either actual or constructive notice.

Shirk *v.* Thomas, 121 Ind. 147.
Osterman *v.* Baldwin, 6 Wall. 116, 122.

The filing of the notice of *lis pendens* was notice of the equitable title of the appellee, and appellant was not a *bona fide* purchaser.

Freeman on Judgments, Secs. 193, 198.
Evans *v.* Welborn, 74 Texas, 530.
Pucket *v.* Benjamin, Adms., 21 Oregon, 370.
Hope *v.* Blair, 105 Mo. 85.
Keller *v.* Stanley, 86 Ky. 240.
Powell *v.* Campbell, 20 Nev. 232.
Dwyer *v.* Rippentoe, 72 Texas, 520.
Stevenson *v.* Edwards, 98 Mo. 622.
Hart *v.* Studman, *ib.* 452.
Cassidy *v.* Kluge, 73 Texas, 154.
Spencer *v.* Credle, 102 N. C. 68.
Collingwood *v.* Brown, 106 *ib.* 362.
Wallace *v.* Marquette, 88 Ky. 131.
Drinkhouse *v.* S. V. W. Co., 87 Cala. 253.
Hovey *v.* Elliott, 118 N. Y. 125.

Amendments of pleadings to change notice of *lis pendens* must be such as change either the cause of action, the parties, or the specific property.

Freeman on Judgments, Sec. 199.
Stone *v.* Connelly, 71 A. D. 449.
Wortham *v.* Boyd, 66 Texas, 401.
Brook *v.* Pierson, 25 Pac. Rep. (Cala.) 963.
Randall *v.* Duff, 19 Pac. Rep. 532.

The doctrine that a judgment lien is superior to the legal title previously to the lien conveyed to a third party by an unrecorded deed, and that this superiority is not affected by notice prior to purchase under judgment execution (to which alone the cases on the brief for appellant apply), is based entirely upon the effect of registration